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In The

Supreme Court of the United States

October Term, 1975

No. 75-553

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, AFL-CIO,

Petitioner,

vs.

REA EXPRESS, INC., Debtor,

REA EXPRESS, INC., Debtor in Possession,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION

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BRIEF IN OPPOSITION TO PETITION

PRELIMINARY STATEMENT

Respondent opposes the issuance of a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit which held that a debtor in possession under Chapter XI of the Bankruptcy Act, [11 U.S.C. §701 *et seq.*] subject to the Railway Labor Act [45 U.S.C. §151

et seq.], may be authorized to disaffirm, as onerous and burdensome, an executory collective bargaining agreement (1a).[1] The Second Circuit, consistent with its prior ruling in *Shopmen's Local Union No. 455, et al. and NLRB v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975), has held that section 313(1) of the Bankruptcy Act [11 U.S.C. §713(1)] is not in conflict with national labor policy as set forth both in the National Labor Relations Act [29 U.S.C. §151 *et seq.*] and in the Railway Labor Act. This holding, it is submitted, is manifestly correct.

STATEMENT OF THE CASE

On February 18, 1975, respondent ("REA") and several of its affiliated companies filed petitions pursuant to the provisions of Chapter XI, section 322, of the Bankruptcy Act [11 U.S.C. §722] in the United States District Court for the Southern District of New York. By order dated February 18, 1975, REA was continued in the possession and operation of its business. Thereafter, on March 24, 1975 REA moved pursuant to section 313(1) of the Bankruptcy Act [11 U.S.C. §713(1)] to reject its collective bargaining agreement with petitioner as onerous and burdensome.[2] On May 2, 1975, the Bankruptcy Court denied the motion and REA appealed to the District Court.

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1. References are to the pages of petitioner's appendix which contains the various opinions below.

2. REA's motion to disaffirm was directed not only to the collective bargaining agreement with this petitioner but also to a similar agreement with the International Association of Machinists and Aerospace Workers ("IAM"). IAM has not petitioned for certiorari.

The Bankruptcy Court found that the labor agreement with petitioner was executory within the meaning of section 313 (1). However, the Bankruptcy Court determined that despite the uncontroverted facts which established that the contract between REA and petitioner was onerous and burdensome it was not "onerous and burdensome" within the meaning of section 313(1).

A reading of the decision of the Bankruptcy Court (19a) establishes that the Court recognized the validity of REA's assertions that it could not effect proposed consolidations under its then existing collective bargaining agreements with petitioner and IAM by reason of the delays inherent in following the procedures thereby required, and that, by reason of the costs to REA mandated by such agreements, REA could not meet its contractual wage and fringe benefit obligations and its obligations to suppliers and other creditors as debtor in possession. Nevertheless, the Bankruptcy Court refused to apply section 313(1) on the ground that it did not think Congress intended to include collective bargaining agreements within its purview.

The District Court disagreed (15a). The District Court found that there was nothing in the legislative history of the Bankruptcy Act to support the proposition that collective bargaining agreements were not within the purview of section 313(1). Citing 8 *Collier on Bankruptcy* 199 (14th ed.) the District Court noted that:

> "There is no restriction on the type of executory contract that may be rejected."

On the basis of the Bankruptcy Judge's findings of fact, the District Court held that the subject collective bargaining agreements were "onerous and burdensome" and, therefore could be rejected under section 313(1). The District Court also found no conflict between section 313(1) of the Bankruptcy Act and the Railway Labor Act, as asserted by petitioner.

The Second Circuit agreed with the District Court that there was no conflict between section 313(1) of the Bankruptcy Act and the mandatory collective bargaining provisions of the Railway Labor Act but remanded the case to the District Court "for further consideration and findings on the question of whether REA's agreements with [petitioner] and IAM are sufficiently onerous and burdensome to warrant an authorization to the debtor in possession to reject them" (14a). The results of that remand are hardly in doubt, especially since REA, despite the disaffirmance of its collective bargaining agreements, was adjudicated a bankrupt on November 6, 1975. The adjudication, however, did not render the issue moot because the ultimate determination of the issue seriously impacts the sums available to creditors on liquidation and the various priorities established in such liquidation.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner asserts that the issue presented for review is whether the Bankruptcy Act permits a District Court to disregard the plain language of the Railway Labor Act. Of course, the Bankruptcy Act permits no such thing. The issue resolved by the Second Circuit which petitioner would have this Court review is whether the two statutes are in conflict. The

Second Circuit found no conflict whereas petitioner asserts that conflict exists and the Bankruptcy Act must give way to the Railway Labor Act.

It is submitted that there are two questions presented for review which may be properly framed as follows:

1. Whether section 313(1) of the Bankruptcy Act contemplates the disaffirmance by a debtor in possession of onerous and burdensome collective bargaining agreements.

The Bankruptcy Court answered this question in the negative; the District Court and the Second Circuit answered it in the affirmative.

2. Whether section 77(n) of the Bankruptcy Act applies to REA and all other debtors who may be subject to the Railway Labor Act but are not railroads with the result that they are precluded from the benefits of section 313(1) of the Bankruptcy Act.

The Bankruptcy Court never reached this question; the District Court and the Second Circuit answered it in the negative.

ARGUMENT

Point I

There is no conflict between the clear language of Section 313(1) of the Bankruptcy Act and the manifest policy of the Railway Labor Act.

Petitioner asserts that there are three compelling reasons for granting the writ it seeks. First, petitioner claims that an important question is presented respecting the application of the Bankruptcy Act to collective bargaining agreements. Second, petitioner relies on an alleged conflict betweeen the Bankruptcy Act and the Railway Labor Act. Third, petitioner asserts that the Second Circuit's resolution of this alleged conflict is erroneous.

It is beyond peradventure that the question of the application of section 313(1) of the Bankruptcy Act to labor contracts is important. However, it hardly presents a substantial question of statutory construction warranting Supreme Court review and was correctly resolved by both the District Court and the Court of Appeals. The District Court noted that there was "nothing cited in legislative history to indicate that collective bargaining agreements cannot be rejected under Section 313(1)" of the Bankruptcy Act (16a).

The scope of section 313(1) was clearly delineated by the Second Circuit in *Kevin Steel, supra,* wherein the Court found both an "unbroken string of cases" and "evidence of

congressional intent" to support the view that executory labor agreements may, under proper circumstances, be disaffirmed in bankruptcy proceedings. *See, Carpenters Local Union No. 2746 v. Turney Wood Products, Inc.*, 289 F. Supp. 143, 147-50 (W. D. Ark. 1968); *In re Overseas National Airways Inc.*, 238 F. Supp. 359, 361 (E.D.N.Y. 1965); *In re Klaber Bros., Inc.*, 173 F. Supp. 83 (S.D.N.Y. 1959); *In re Public Ledger, Inc.*, 63 F. Supp. 1008 (E.D. Pa. 1945), *rev'd in part*, 161 F.2d 762 (3d Cir. 1947). Relying, in part, on this Court's decision in *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), the Second Circuit read section 313(1), and applied it, broadly. In this respect the decision below is precisely the same as that in *Kevin Steel.*

However, *Kevin Steel* dealt with an alleged conflict between section 313(1), and sections 8(a)(5) and (d) of the National Labor Relations Act [29 U.S.C. §158(a)(5) and (d)]. Here, the Second Circuit dealt with the alleged conflict between section 313(1) and the Railway Labor Act [45 U.S.C. §151 *et seq.*]. In both cases the Court of Appeals recognized that the purpose of the labor laws "is to avoid disruptions of commerce by forcing the parties to exhaust collective bargaining procedures . . ." (7a) and that the purpose of section 313(1) of the Bankruptcy Act was to give debtors a new start "by relieving [them] of executory contracts that would threaten or prevent [their] survival" (7a-8a). Applying the well established principle that "absent a clearly expressed congressional intention to the contrary" it was the Court's duty to give effect to the Bankruptcy Act. [*Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-4 (1974); *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30, 39-42 (1957)], the Second Circuit found no conflict between section

313(1) and either the National Labor Relations Act or the Railway Labor Act.[3]

Indeed, petitioner's assertion of conflict is manifestly specious. The gravamen of petitioner's argument is that section 313(1) of the Bankruptcy Act is inapplicable because REA is a "carrier" within the meaning of the Railway Labor Act. Thus, REA and, therefore, its collective bargaining agreements are somehow sacrosanct. REA readily concedes that it is a "carrier" and subject to the Railway Labor Act much the same as most interstate employers are subject to the National Labor Relations Act. However, there is no express statutory prohibition against rejection of collective bargaining agreements by debtors in possession or trustees in bankruptcy and there is no implied conflict between the Railway Labor Act and the Bankruptcy Act. As the Second Circuit correctly found, REA, as debtor in possession, is a new juridical entity created by the Bankruptcy Act (9a-10a). *See, Kevin Steel, supra* at 704. As such, it is vested with different rights and obligations than those vested in REA, as debtor, and should have the ability to extricate itself from onerous and burdensome work practices which would defeat the possibility of effecting an arrangment with creditors and restoring itself to economic viability. As debtor in possession, REA may affirm or adopt the contracts of its predecessor in interest but it need not do so. Here, it chose to exercise its statutory right to reject which left it nevertheless subject to the Railway Labor Act but as a newly created employer which, if it sought to utilize the same or a similar labor force, was

3. The Second Circuit correctly found that the apparent exception to section 313(1) contained in section 77(n) of the Bankruptcy Act was inapplicable to REA. *See,* Point II, *infra.*

compelled to negotiate with petitioner in accordance with the procedures set forth in the Railway Labor Act. *See, NLRB v. Burns Security Services,* 406 U.S. 272, 277-81 (1972).

The Second Circuit recognized that to hold that the Railway Labor Act is pre-eminent and precludes application of the Bankruptcy Act "would be to defeat the purpose of the Railway Labor Act itself, which is to avoid disruption of commerce by insuring that the carrier will continue operations pending resolution of labor disputes, since the end result could be to preclude financial reorganization of the carrier and thus lead to its demise" (8a-9a). It further recognized that trustees, receivers and debtors in possession were governed by the provisions of the Railway Labor Act but that the real issue was whether they were required to maintain the *status quo* while proceeding with collective bargaining (10a). Absent a clear congressional mandate such as that contained in section 77(n) of the Bankruptcy Act [11 U.S.C. §205(n)] the Second Circuit held that the *status quo* need not be maintained. This is an eminently reasonable result since to hold otherwise could well destroy the viability of an arrangement with creditors under Chapter XI of the Bankruptcy Act.

Petitioner's reliance upon *Acheson, et al. v. Falstaff Brewing Corp.,* ——F.2d——(Dkt. No. 73-2855, 9th Cir., Aug. 25, 1975) is inapposite. There is no conflict in the circuits created by the *Falstaff* case. *Falstaff* did not deal with a debtor in possession or with the application of section 313(1) of the Bankruptcy Act. There, a successor employer refused to recognize seniority rights under a collective bargaining agreement to which it was not a party. Its refusal was sustained

on the grounds that there was not sufficient "enterprise continuity" to justify the relief sought. The successor employer was not subject to the Bankruptcy Act and no "new juridical entity" was involved. The issue in *Falstaff* was essentially one of construing the specific provisions of a collective bargaining agreement made binding on the parties and their "successors, purchasers, transferees and assignees."

Point II

Section 77(n) of the Bankruptcy Act does not preclude REA from invoking Section 313(1) of the Bankruptcy Act.

Petitioner contends that the application of section 313(1) is precluded by section 77(n) of the Bankruptcy Act [11 U.S.C. §205(n)], a proposition specifically rejected by the Second Circuit (9a). Section 77(n) represents a particular congressional solicitude for railway workers based on Congress' concern for the continued health of the interstate railway systems of this country. It is clear that the railroad reorganization sections of the Bankruptcy Act constitute and must be construed as an integrated whole. They were enacted by the Congress in 1933 to meet a particular need. The congressional purpose is amply set forth in the report of the House of Representatives [Report Number 1897, 72d Cong., 2d Sess. (1938)] as follows:

> "Railroads are at this time excluded from the operation of the bankruptcy law. The necessity for the enactment of this section grows out of the present expensive, protracted, confusing, and inefficient administration of affairs of railroad

> companies engaged in interstate commerce in equity receiverships. The necessity for its immediate enactment results from the fact that at the present time many of the railroad organizations of the country confront the necessity of reorganization. They have reached the limit of their ability to borrow from the Reconstruction Finance Corporation. They must either reorganize under some arrangement such as is provided for by this section, or be administered in equity receiverships. The protracted period of such administration, the duplication of expense incident to ancillary receiverships, the waste, the opportunity for manipulation on the part of special groups, are too well known to require comment." *Supra* at 5.

The very same congressional report makes only brief mention of what is now section 77(n) of the Bankruptcy Act. It is defined as "regulating minor questions of procedure." *Supra* at 8.

As originally enacted, what is now section 77(n) provided as follows:

> "No judge or trustee acting under this Title shall change the wages or working conditions of railroad employees, except in the manner prescribed in [the Railway Labor Act,] or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932,

> between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class I railroads."

Thus, it is clear that the Congress was specifically concerned with railroad reorganization and *not* with corporations entitled to the benefits of other provisions of the Bankruptcy Act. It is a matter of historical fact that REA was at one time an adjunct of the railroads. It is also a matter of fact that its labor relations are governed by what is now the Railway Labor Act. However, REA is *not* entitled to the benefits of railroad reorganization under section 77 of the Bankruptcy Act [11 U.S.C. §205] and it is manifestly unreasonable to deny it the right afforded debtors under section 313(1) while at the same time precluding it from reorganizing as a railroad under section 77.

There is no question whatsoever that REA is not a railroad, that its employees are not "railroad employees," and that it is not entitled to the benefits of the railroad reorganization provisions of the Bankruptcy Act. The Court's attention is directed to Senate Report Number 92-1158 [92nd Cong., 2d Sess. (1972)], the Report of the Senate Committee on Commerce on Federal Assistance For Carriers of Express. There, the Senate Commerce Committee, in considering legislation to provide federal loan guarantee assistance for certain common carriers of express, including specifically REA, reported as follows:

> "It is necessary to distinguish the effects of REA bankruptcy and that of a railroad. While railroads which filed for bankruptcy come under

> the provisions of Section 77 of the Bankruptcy Act which in effect means that the railroad while in reorganization keeps operating, this section does not apply to REA. REA would come under the provisions of Chapter 10 of the Bankruptcy Act which does permit reorganization of the corporation and continued operation by the debtor, or the Bankruptcy Court could order liquidation. There is no way of knowing whether and certainly no guarantee that REA would be kept in operation if it entered bankruptcy.
>
> * * *
>
> If REA should go into bankruptcy, the provisions of Section 77 of the Bankruptcy Act would not apply, since it is not a common carrier by railroad. If such a situation should develop, operations probably would continue to be conducted under the provisions of Chapter X of the Bankruptcy Act which permits reorganization of the corporation, and continued operation by the debtor. A bankruptcy court, however, has the power to order liquidation."

The congressional purpose in providing for railroad reorganization is clear. It is also clear that section 77(n) which is part and parcel of the railroad reorganization provisions of the statute applies only to railroads and not to express companies and other corporations which are not entitled to the benefits of railroad reorganization. This is the statutory history; this is the statutory language; and this is the ruling of the Second Circuit.

CONCLUSION

No substantial federal question is presented requiring review by this Court. The decision of the Second Circuit is fully supported by the legislative history of the Bankruptcy Act and the Railway Labor Act. It is fully consistent with the decisions of this Court. There is no conflict in the circuits. Accordingly, the petition should be denied.

Respectfully submitted,

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